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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 98

ISIAH RELFORD,

Petitioner,

v.

COMMANDANT, U.S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

THE FACTS OF THIS CASE FALL WITHIN THE SCOPE OF THIS COURT'S HOLDING IN O'CALLAHAN v. PARKER

While seeming to tacitly admit that all on-post crimes are not automatically service-connected, respondent urges this

Court to adopt a rule that any crime committed by a serviceman "affecting the physical safety of persons and property on a military base is *per se* service-connected . . ." within the meaning of this Court's decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969). (Brief for the Respondent, page 13; see also Brief for Respondent, page 16.) In an attempt to justify its position, respondent submits that the military has an interest in the security of persons and the protection of property on a military installation, and that the commander of a military installation has the responsibility and authority to maintain law and order in his command. (Brief for Respondent, pages 14 and 15). Based on this reasoning, respondent concludes that the military must be able to determine the guilt or innocence of a serviceman accused of behavior that disrupts the physical security of a military installation and must be able to punish servicemen guilty of such behavior. It is submitted that respondent's conclusion does not logically follow its reasoning and is inappropriate when considered in the context of this Court's decision in *O'Callahan*.

Petitioner does not contest that the military has an interest in the security of persons and property on a military installation nor that the commander of a military installation has the responsibility and authority to maintain law and order in his command. However, these factors do not demand court-martial jurisdiction of all on-post crimes. Crimes involving a level of conduct required only of servicemen, military crimes, are the types of offenses in which the military's interest in maintaining discipline may be compelling. Not being cognizable in civilian courts, these offenses must be dealt with by the military authorities. By their very nature, military crimes may involve situations calling for a "prompt, ready-at-hand means of compelling obedience" if military discipline is to be maintained. *Toth v. Quarles*, 350 U.S. 11 at 22 (1955). In addition, military personnel "may be especially competent to try soldiers for infractions of military rules." *O'Callahan v. Parker, supra*, at 263. However, offenses committed by servicemen which

are not uniquely military in nature and are cognizable in open and functioning civilian courts, whether committed on- or off-post, could and should be tried in civilian courts without any prejudice to military discipline. Such crimes will not go unpunished. Their punishment will simply be determined by civilian rather than military courts. Furthermore, these crimes do not by their nature require military action or trial by military personnel. The military interest in the maintenance of law and order on the military installation is served in the case of on-post, non-military crimes by the apprehension and arrest of the accused. Consequently, it does not follow that the military must be able to subject servicemen to trial by court-martial and military punishment for the commission of on-post civilian crimes in order to adequately serve its interest in the maintenance of law and order on a military reservation.

The cases cited by respondent for the proposition that the commander of a military installation has the responsibility and authority to maintain law and order in his command, *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); *United States v. Jelinski*, 411 F.2d 476 (5th Cir. 1969); and *Weissman v. United States*, 387 F.2d 271 (10th Cir. 1967), do not support respondent's conclusion. These cases stand for the proposition that the commanding officer of a military installation has the power to bar a civilian from that military installation without prior notice or hearing. They do not stand for the proposition that the military commander has the power or even the need to punish illegal behavior occurring in his command in order to maintain law and order. It is true that the individuals involved in these cases were civilians rather than servicemen. However, in the context of a civilian crime, the fact that the criminal is a serviceman does not alter the interest of the military in the security of persons and property on a military reservation. This Court's opinion in *O'Callahan* makes it clear that "the fact that courts-martial have no jurisdiction over non-soldiers, whatever their offense, does not necessarily imply that they

have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged." 395 U.S. at 267. The nature of the crime involved must create an immediate need for military disciplinary action. There is no such need in the context of a non-military crime cognizable by civilian courts. Furthermore, it should be noted that the Defense Department presently employs approximately 1,083,868 civilians in the United States. See Selected Manpower Statistics, Department of Defense, April 15, 1970 at page 68. There are presently approximately 3,434,915 United States military personnel throughout the world. *Id.* at page 37. These servicemen have approximately 4,359,652 civilian dependents who either live on or have access to military installations within the United States. *Id.* at page 37. It is well established that the military courts have no jurisdiction over civilians employed by the military and civilian dependents of servicemen. See *Grisham v. Hagan*, 361 U.S. 278 (1960); *Reid v. Covert*, 354 U.S. 1 (1957). It is difficult to see how the security of persons and property on a military installation demand court-martial jurisdiction over a serviceman's on-post crimes when almost half of the military community is not in any event subject to that jurisdiction.

In light of their essential nature and the limited nature of their jurisdiction, this Court recognized in *O'Callahan* that the justification for the system of specialized military courts rests solely on the "special needs of the military" and that, consequently, the jurisdiction of courts-martial must be limited to the "least possible power adequate to the end proposed." 395 U.S. at 265. As considerations of military discipline and effectiveness do not require military military jurisdiction over civilian crimes merely because they are committed on a military installation, extension of military jurisdiction to cover these crimes falls without the "least possible power adequate to the end proposed" concept of the *O'Callahan* decision.

Respondent's suggestion that petitioner's position would forbid the military to punish any behavior that also violates civilian law misconceives petitioner's argument. (See Brief for Respondent, page 16). One act may result in separate offenses, one military and the other civilian. For example, assaulting a superior commissioned officer may constitute both a violation of 10 U.S.C. § 890 (Art. 90, Uniform Code of Military Justice) and the common-law crime of assault. Petitioner's argument would not forbid military jurisdiction over the military crime involved. The military's interest in preserving *military* discipline will not be affected.

Even though limited to on-post crimes directly jeopardizing the physical security of military installations, respondent's position will lead to the use of military installation boundaries as a dividing line between civilian and military jurisdiction without the need for an analysis of the nature of the offense (other than whether it jeopardizes the security of the military installation), the effect of the offense on the special needs of the military or any other factors. Respondent's contention will, therefore, not avoid the arbitrary nature of jurisdiction based on an on-post/off-post dichotomy. (See Brief for Petitioner, page 11.) In addition, respondent's position will in no way eliminate any confusion which has arisen since *O'Callahan* in the context of off-post crimes. Petitioner's position is not only totally consistent with the rationale of *O'Callahan*, it is also a rational and workable approach to the problem of court-martial jurisdiction.

II.

O'CALLAHAN v. PARKER SHOULD BE GIVEN FULL RETROACTIVE EFFECT

Respondent urges that this Court's decision in *O'Callahan v. Parker* should be given partial retroactive effect in that it should not affect those cases where court-martial convictions became final within the military appellate system before June 2, 1969, the date of the *O'Callahan* decision.

In part, respondent bases its position on this Court's decision in *De Stefano v. Woods*, 392 U.S. 631 (1968). In *De Stefano* this Court held that the jury trial requirements imposed upon the states by *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), should be prospective only. This Court's decision in *De Stefano* should not be determinative of the question here involved. It is well established that the retroactivity of a particular decision does not depend upon the constitutional provisions upon which a decision is based. *Desist v. United States*, 394 U.S. 244 (1969). In addition, this Court's opinion in *O'Callahan* clearly indicates that much more than the right to trial by jury and the right to indictment by grand jury was involved in *O'Callahan*. The right to trial in a *civilian* court, with all its attendant differences from trial by court-martial, was at the heart of the *O'Callahan* decision. The distinction between trial by jury and trial by selected members of the military forces and between indictment by grand jury and by the military counterpart, the Article 32 investigation, are only two of the distinctions between civilian and military jurisdiction thought significant by this Court in *O'Callahan*. Extreme importance is placed by this Court on the fact that a court-martial "has always been and continues to be primarily an instrument of discipline, not justice." 395 U.S. at 266. In addition, the Court places emphasis on such factors as the danger of command influence on all phases of the court-martial system and the differences between military judges and the judges in civilian courts. 395 U.S. at 264. The Military Justice Act of 1968, 82 Stat. 1335 did take strides toward curing many of the faults of the military system of justice. However, that Act can by no means be considered a complete cure for the problems which inundate the court-martial system and it certainly has not silenced the critics of that system. See, i.e., remarks of Senator Birch Bayh, CONG. REC., S10438, July 1, 1970 and S12862, August 6, 1970; Schiesser, *Trial by Peers: Enlisted Members of Courts-Martial*, 15 CATH. U. L. REV. 171 (1966); Schiesser

& Benson, *Modern Military Justice*, 19 CATH. U. L. REV. 489 (1970).

Contrary to *De Stefano v. Woods, supra*, *O'Callahan* involved the conviction of an individual by a court which had no jurisdiction over the particular offense of which he was accused. Despite any contention that court-martial convictions are not in general inherently unfair, it is submitted that court-martial convictions for offenses over which the court had no jurisdiction are *per se* unfair. This contention does not amount to a "mere playing with words" as is suggested by respondent (Brief for Respondent, page 31). Rather, the integrity of the fact-finding process by which petitioner was tried and sentenced is no less impugned by his conviction for an offense that the military had no power to try and punish him for than for an offense he did not commit. Petitioner does not contend that the same criteria that governed this Court's other retroactivity cases should not also govern its decision in the instant case. Those other cases have uniformly recognized that the effect of the proscribed practice on the integrity of the fact-finding process is the crucial question. See, e.g., *Stovall v. Denno*, 388 U.S. 293 (1967). The cases listed by respondent for the proposition that the courts have rejected arguments that retroactivity must follow from a finding of no jurisdiction are inapposite. (Brief for Respondent, page 32.) In the first place, both cases, *McSparran v. Weist*, 402 F.2d 867 (3rd Cir. 1968), and *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969), are civil rather than criminal cases and the same criteria should not apply. Furthermore, both *McSparran v. Weist* and *Lester v. McFaddon* hold that manufactured diversity does not constitute an adequate foundation for Federal jurisdiction. Unlike *O'Callahan*, they do not involve the constitutional limitation of a court's subject matter jurisdiction but merely determine that an established jurisdictional prerequisite does not exist under certain circumstances. Finally, in *Lester* the Court stated that, "Even if it be jurisdictional, diversity of citizenship is but a quasi-jurisdictional fact. A judgment based

upon an erroneous finding of diversity is not void and it is immune from collateral attack." 415 F.2d at 1107 (citing cases). It is submitted that a judgment based upon an erroneous finding of subject matter jurisdiction is void and is not immune from collateral attack. Obviously, these cases do not support the proposition that *O'Callahan* should be given prospective application only.

Respondent also asserts that a retroactive application of *O'Callahan* would have a disruptive effect on the administration of justice. (Brief for the Respondent, page 28.) Respondent bases this contention on a statement of the Army Judge Advocate General and on an observation of the Court of Military Appeals in its decision in *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970). To be sure, a reliable estimate of the number of court-martial convictions that could be overturned by a retroactive application of *O'Callahan* would probably be most difficult to secure. Nevertheless, respondent does not support its contention with any empirical data. Certainly if such data has been compiled, it would be available to respondent. In any event, respondent's assertion would seem subject to some question. In the first place, it appears that relatively few civilian crimes were tried in the military courts even prior to *O'Callahan*. The special civilian committee for the study of the U.S. Army confinement system has estimated that of the prisoners placed in confinement by the military, at least 85 percent and perhaps as many as 90 percent are men who have either absented themselves without leave or deserted. These are, of course, crimes involving a level of conduct required only of servicemen and are uniquely military in nature. The same study indicated that another three to five percent are in prison for other military type offenses, such as disrespect of a superior officer, failure to obey a lawful order and breaking restriction. In addition, empirical data has been compiled which indicates that since June 2, 1969, the date of the *O'Callahan* decision, there simply has not been the deluge of applications for review, petitions for reconsideration, applications for back pay or

rank, petitions for the issuance of a writ of habeas corpus and the like expected or posited by respondent and the military.

Finally, the purpose of the *O'Callahan* rule is to correct an abuse that, in fact, affects the integrity of the fact-finding process, a purpose well-served by retroactive application. Neither a reliance factor nor an impact on the administration of justice will avoid retroactive application in these circumstances. See *Desist v. United States,* 394 U.S. 244 (1969); *Roberts v. Russell,* 392 U.S. 293 (1968); *Witherspoon v. Illinois,* 391 U.S. 510 (1968).

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, it is respectfully submitted that the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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